

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Microsoft Corporation,

Plaintiff,

v.

Motorola, Inc., Motorola Mobility LLC, and
General Instrument Corporation,

Defendants.

No. C10-1823-JLR

NONPARTIES RESEARCH IN
MOTION LIMITED AND
RESEARCH IN MOTION
CORPORATION'S MOTION TO
FILE DOCUMENTS UNDER
SEAL

**NOTE ON MOTION
CALENDAR: November 9, 2012**

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the Protective Order¹ in this case (Dkt. No. 434-1), nonparties Research In Motion Limited and Research In Motion Corporation (collectively, "RIM") respectfully seek leave to file under seal the following documents:

- (1) RIM's Motion to Seal Terms of Patent License Agreements and to Deny Microsoft In-House Counsel Access to the Agreements ("Motion"); and
- (2) Declaration of Michael J. Crowley in Support Thereof ("Crowley Declaration," collectively, "Papers").

RIM seeks to file its Papers under seal because they contain information that has been identified and treated by the parties in this matter as confidential business information under the terms of the Protective Order. Additionally, the Papers contain information that the Court has already deemed confidential as meeting the Ninth Circuit's "compelling reasons" standard. (*See* Order, D.I. 292, at 3-4 (descriptions of Motorola's licensing negotiations and agreements with third parties, as well as copies of licensing agreements between Motorola and third parties, constitute commercially sensitive and confidential information sufficient to meet the 'compelling reasons' standard).)

For these reasons, and as more fully described below, RIM respectfully requests permission to file its Motion and the Crowley Declaration under seal. RIM is filing a redacted version of its Motion and the Crowley Declaration as part of the public record.

II. FACTS & AUTHORITY

A. RIM Seeks Leave of the Court Pursuant to the Court's Instructions of October 18, 2012, the Protective Order, and Applicable Court Rules to File Confidential Information under Seal.

¹ RIM uses the term "Protective Order" herein to refer to the Amended Protective Order Regarding the Disclosure and Use of Discovery Materials (D.I. 434-1).

On October 18, 2012, at the conclusion of the *Daubert* hearing in this pending matter, the Court invited third parties to file motions for a protective order if those parties believed their confidential and/or proprietary information would be unjustly disclosed to the public during the upcoming trial beginning on November 13, 2012. During the discovery phase of these proceedings, confidential patent licensing information between RIM and the parties had been disclosed with assurances made to RIM that such information would be kept confidential. Because it is RIM's understanding that one or both of the parties now intend to use RIM's confidential information in open court during trial, RIM respectfully accepts the Court's invitation to submit a motion to preserve the confidential nature of RIM's information during trial.

To adequately explain to the Court the need to preserve the confidential nature of this information, RIM provides to the Court in the contents of its Papers thorough descriptions of the relevant confidential information and its significance. RIM also provides confidential information regarding RIM's lack of a broad patent license with a certain company. Therefore, RIM requests that pursuant to paragraphs 2(a) and 8 of the governing Protective Order, the Court permit RIM to file its Papers under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing. . . . During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

1 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 2 "trade secrets or other confidential research, development, or commercial information" under
 3 seal. Fed. R. Civ. P. 26(c)(1)(G) and (H). District courts "are in the best position to weigh
 4 fairly competing needs and interests of the parties affected by discovery," in crafting the
 5 appropriate treatment of documents for which protected treatment is requested. *Seattle Times*
 6 *Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d
 7 1206, 1211-12 (9th Cir. 2002).

8 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed
 9 in support of a dispositive motion upon a "compelling showing that the public's right of access
 10 is outweighed by the interests of the public and the parties in protecting the court's files from
 11 public review." *Id.*; *see also Kakakama v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179
 12 (9th Cir. 2006).

13 Further, while the public generally enjoys a right to inspect and copy public records,
 14 "it is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every
 15 court has supervisory power over its own records and files, and access has been denied where
 16 court files might have become a vehicle for improper purposes." *Nixon v. Warner Comm'cns,*
 17 *Inc.*, 435 U.S. 589, 598 (1978). As the Court recognized, one such "improper purpose" is
 18 where the commercial business information at issue is sought to be used as a "source[] of
 19 business information that might harm a litigant's competitive standing." *Id.* (denying access
 20 to cop[ies] of tapes played at trial and noting that courts refused public access to their files
 21 where granting such access might "become a vehicle for improper purposes," including
 22 causing a litigant competitive harm). Compelling reasons exist to grant RIM's motion to seal.

23 **B. Compelling Reasons Exist for Filing and Maintaining under Seal RIM's**
 24 **Papers.**

25 RIM's Motion and the accompanying Crowley Declaration are replete with specific,
 26 proprietary, and confidential information that, if disclosed to the public, would likely harm

1 RIM's competitive standing in the marketplace. RIM's Papers divulge certain terms of RIM's
2 licensing agreements with Motorola. RIM's Papers also discuss the fact that there is no broad
3 patent license agreement in place between RIM and a certain company. This is precisely the
4 type of information that would induce market competitors to use court files as a vehicle for
5 improper purposes.

6 Further, the Court has already determined that the type of information disclosed in
7 RIM's Papers is the type of information that meets the Ninth Circuit's "compelling interest"
8 standard to maintain confidentiality. *See* Order, D.I. 292, at 3-4 (descriptions of Motorola's
9 licensing negotiations and agreements with third parties, as well as copies of licensing
10 agreements between Motorola and third parties, constitute commercially sensitive and
11 confidential information sufficient to meet the 'compelling reasons' standard).

12 Finally, to balance the public's general right to inspect and copy public records with its
13 need to preserve the confidentiality of its proprietary information, RIM is filing a redacted
14 version of its Motion and the Crowley Declaration as part of the public record. RIM
15 respectfully requests that the confidential version of its Papers submitted herewith be filed and
16 maintained under seal.

17 III. CONCLUSION

18 RIM has filed the above-referenced documents under seal based on its good-faith
19 belief that such material qualifies for protection under the terms of the Protective Order and
20 the applicable Court rules. A [Proposed] Order Granting RIM's Motion to File Documents
21 Under Seal has been submitted herewith.

1 Dated this 29th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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